STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL SANDERSON and AMY SANDERSON, Plaintiffs-Appellants, v CAHILL CONSTRUCTION COMPANY, Defendant, and SKYLINE CONCRETE FLOOR CORPORATION, Defendant-Appellee.	UNPUBLISHED April 5, 2011 No. 294939 Macomb Circuit Court LC No. 2008-003373-NO

Before: K. F. KELLY, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Plaintiff Michael Sanderson, a skilled carpenter, fell from a workplace scaffold and shattered his elbow. The accident occurred when a leg of the scaffold slipped into an unguarded hole, destabilizing the structure and hurling Sanderson to the floor. Invoking *Fultz v Union Commerce Assoc*, 470 Mich 460; 683 NW2d 587 (2004), the circuit court foreclosed Sanderson's tort claim against defendant Skyline Concrete Floor Corporation (Skyline), which created the hole. Specifically, the circuit court found that Skyline owed "no independent duty" apart from its contract with Cahill Construction Company (Cahill), the building site's general contractor. This Court granted an application for leave to appeal filed by plaintiffs Michael Sanderson and Amy Sanderson.[1] Because record evidence gives rise to a genuine issue of

[1] *Sanderson v Cahill Constr Co*, unpublished order of the Court of Appeals, entered 2/26/10 (Docket No. 294939). The singular Sanderson hereafter will refer to plaintiff Michael Sanderson.

material fact regarding whether Skyline breached a common-law duty of care, we now reverse the circuit court's grant of summary disposition to Skyline and remand for further proceedings.

Sanderson worked as a commercial carpenter for Pontiac Ceiling and Partition Company (Pontiac), a subcontractor to Cahill. On the day of the accident, Sanderson and a coworker were framing in a drop drywall ceiling at a new shopping mall. Sanderson climbed onto a one-person scaffold owned by Pontiac. When he reached the top platform, one of the scaffold's legs slipped into a hole in the concrete floor, tilting the scaffold and pitching Sanderson to the ground. A coworker described the hole as approximately one foot in diameter and eight inches deep. Skyline poured the concrete floor and fashioned the hole for later use as a drain. At Sanderson's deposition, he recounted that duct work, conduit pipe and concrete forms covered the floor, obscuring visibility of the uncovered hole. Sanderson's complaint asserts that Skyline negligently failed to cover the hole, creating an unreasonable danger for other workers on the site.

Skyline moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Although the circuit court did not specify under which subrule it viewed summary disposition as appropriate, the court apparently considered documentation beyond the pleadings. We review de novo the circuit court's summary disposition ruling and apply MCR 2.116(C)(10) as the subrule guiding our review. MCR 2.116(G)(5); *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh*, 263 Mich App at 621. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West*, 469 Mich at 183.

A plaintiff asserting a claim of negligence must prove (1) the defendant owed a duty to the plaintiff, (2) the defendant breached that duty, (3) causation, and (4) damages. *Cummins v Robinson Twp*, 283 Mich App 677, 692; 770 NW2d 421 (2009). "A duty of care may arise from a statute, a contractual relationship, or by operation of the common law, which imposes an obligation to use due care or to act so as not to unreasonably endanger other persons or their property." *Id*. The common-law duty of due care applies in the construction context, as this Court summarized in *Ghaffari v Turner Constr Co (On Remand)*, 268 Mich App 460, 466; 708 NW2d 448 (2005): "Although a subcontractor has no duty under the common work area doctrine to make a work site safe for the employees of another subcontractor, a subcontractor has a common-law duty to act in a manner that does not cause unreasonable danger to the person or property of others."

The circuit court, seemingly conflating tort and contractual duties, effectively ruled that Skyline's contract with Cahill trumped its common-law duty of care. A duty stemming from a contract is simply not equivalent to a duty arising under longstanding, common-law tort principles. Professor Prosser conceptually partitioned the two separate duties as follows: "Has the defendant broken a duty apart from the contract? If he has merely broken his contract, none can sue him but a party to it, but if he has violated a duty to others, he is liable to them." Prosser

& Keeton, Torts (5th ed), § 93, p 668 n 2. Indeed, *Fultz*, 470 Mich 460, specifically contemplates that notwithstanding the existence of a contract, tort duties to third parties may simultaneously lie:

> If [the] defendant negligently performs a contractual duty or breaches a duty arising by implication from the relation of the parties created by the contract, the action may be either in contract or in tort. In such cases, however, no tort liability arises for failing to fulfill a promise in the absence of a duty to act that is separate and distinct from the promise made. [*Id*. at 469-470.]

Stated differently, tort liability may attach in the presence of a duty that arises separately and distinctly from the contractual agreement.

In this case, Skyline owed a common-law duty "to act in a manner that does not cause unreasonable danger to the person or property of others." *Ghaffari*, 268 Mich App at 466. Cahill's contract with Skyline neither created this separate and distinct duty of care, nor eliminated it. "[N]othing in our state's jurisprudence absolves a subcontractor—or anyone on a construction job—of liability under the common-law theory of active negligence." *Johnson v A & M Custom Built Homes of West Bloomfield, PC*, 261 Mich App 719, 722; 683 NW2d 229 (2004).

> "As between two independent contractors who work on the same premises, either at the same time or one following the other, each owes to the employees of the other the same duty of exercising ordinary care as they owe to the public generally." 65A CJS § 534 p 291. Thus, where a subcontractor actually performs an act, it has the duty to perform the act in a nonnegligent manner. [*Id*. at 723.]

Because Skyline owed a common-law duty to avoid active negligence, the circuit court misplaced its summary disposition ruling on *Fultz*, 470 Mich 460. The duty alleged by the plaintiff in *Fultz* stemmed solely from a contract between others, not the common law. The plaintiff in *Fultz* slipped and fell in an icy parking lot owned by Comm-Co Equities. *Id*. at 461. Comm-Co had contracted with Creative Maintenance Limited (CML) for snow removal services. *Id*. at 461-462. The plaintiff sued both Comm-Co and CML, claiming that CML's negligent failure to plow or salt the parking lot caused her fall. *Id*. The plaintiff theorized that CML owed her "a common-law duty … to exercise reasonable care in performing its contractual duties," and that CML breached this duty "by failing to perform its contractual duty of plowing or salting the parking lot." *Id*. at 463-464, 468. The Supreme Court observed that the plaintiff had "allege[d] no duty owed to her independent of the contract." *Id.* at 468.

In *Fultz*, the Supreme Court held that as a matter of law, CML "owed no contractual *or common-law duty* to plaintiff to plow or salt the parking lot." *Id.* at 463 (emphasis added). The Supreme Court rejected that a common-law duty of care to an injured plaintiff arises solely from the breach of a contract between two other parties. The Court instructed lower courts to analyze tort claims brought by third parties to a contract "by using a 'separate and distinct' mode of analysis. Specifically, the threshold question is whether the defendant owed a duty to the plaintiff that is separate and distinct from the defendant's contractual obligations. If no independent duty exists, no tort action based on a contract will lie." *Id.* at 467.

In light of the common-law based theory of negligence set forth in Sanderson's complaint, the language in *Fultz*, 470 Mich 460, supports our reversal of the circuit court. In *Fultz*, the plaintiff predicated her negligence claim on the snow plowing agreement between Comm-Co and CML. She contended that the defendants breached duties originating within the four corners of their contract, rather than duties found in the common law of negligence. The language chosen by the Supreme Court in rejecting the plaintiff's position illuminates the sharp limits of *Fultz*'s ultimate holding: "Accordingly, the lower courts should analyze tort actions *based on a contract* and brought by a plaintiff who is not a party to that contract by using a 'separate and distinct' mode of analysis." *Id.* at 467 (emphasis added). In this case, Sanderson's tort cause of action is not "based on a contract." *Id.* Unlike Fultz's claim, Sanderson's averments lack any reference to a contract. Nor does a contract provide Sanderson with any evidence necessary to establish his prima facie negligence claim.

Skyline theorizes that because its contract with Cahill obligated it to observe regulations and other safety codes contained in the Occupational Safety and Health Act (OSHA), 29 USC 651 *et seq.*, regulations, and other safety codes, Skyline's duty was purely contractual and extended only to Cahill. However, the "separate and distinct" duty analysis described in *Fultz* refutes that contractual safety obligations supplant safety concerns originating in common-law negligence precepts. The existence of a contract addressing the subject matter of the contested duty merely triggers an inquiry whether "the defendant owed a duty to the plaintiff that is *separate and distinct* from the defendant's contractual obligations." 470 Mich at 467 (emphasis added). Here, regardless of Skyline's contractual pledges to observe workplace safety rules and regulations, Skyline owed workers employed by other subcontractors a common-law duty to avoid negligently constructing the concrete floor. Skyline's creation of a hole in the floor shared by other workers using movable scaffolding gave rise to a common-law duty to consider whether an uncovered floor opening represented a potential danger. In Prosser's parlance, this duty "apart from the contract" establishes a legal basis for Skyline's tort liability. Prosser & Keeton, Torts (5th ed), § 93, p 668 n 2.

Moreover, Skyline's reliance on the contract's safety terms undermines the purposes of OSHA, the Michigan Occupational Safety and Health Act (MIOSHA), MCL 408.1001 *et seq.*, and other safety rules and regulations. OSHA's overriding purpose is to prevent workplace injuries and deaths. *Whirlpool Corp v Marshall*, 445 US 1, 11; 100 S Ct 883; 63 L Ed 2d 154 (1980). Similarly, "[t]he MIOSHA was designed to ensure that employers in business, industry, and government keep their employees' work sites free of recognized hazards." *Hottman v Hottman*, 226 Mich App 171, 179; 572 NW2d 259 (1997). These purposes overlap with those underlying tort law: "The policy behind the law of torts is more than compensation of victims. It seeks also to encourage implementation of reasonable safeguards against risks of injury." *Funk v Gen Motors Corp*, 392 Mich 91, 104; 220 NW2d 641 (1974), overruled in part on other grounds in *Hardy v Monsanto Enviro-Chem Sys, Inc*, 414 Mich 29; 323 NW2d 270 (1982). However OSHA and MIOSHA violations do not invest injured workers with tort remedies. *White v Chrysler Corp*, 421 Mich 192, 199 n 7; 364 NW2d 619 (1984); see also MCL 408.1002 ("Nothing in this act shall be construed to . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries . . . arising out of, or in the course of, employment."). OSHA and MIOSHA violations may supply evidence of negligence, but do not constitute negligence per se. *Zalut v Andersen & Assoc, Inc*, 186 Mich App 229, 235-236; 463 NW2d 236 (1990).

Here, Sanderson seeks compensation for a workplace injury by asserting a traditional negligence claim, independent of OSHA and MIOSHA dictates. Yet Skyline urges us to affirm the circuit court's decision to deny redress for Skyline's alleged safety violation on its contract's incorporation of the very rules and regulations intended to prevent workplace negligence. We find this an inherently contradictory and a legally insupportable result. *Fultz* teaches that courts must locate the source of a negligence claim in a tort-law based duty of care. *Fultz* does not immunize a defendant's safety violation solely because the defendant pledged safe behavior in an immaterial contract.

In summary, because the common law supports that Skyline owed Sanderson a duty to cover the hole, the circuit court improperly granted Skyline summary disposition on the basis of *Fultz*. Nor do we find merit in Skyline's alternative argument that Sanderson failed to offer any evidence of Skyline's negligence. In response to Skyline's motion for summary disposition, Sanderson produced an affidavit signed by Thomas M. Fanslow, a "certified safety professional," attesting that Skyline owed a duty to cover the holes it had created "with a secured cover" that could not be moved or displaced. As the dissent recognizes:

> Other regulations require that such covers be capable of supporting twice the weight of employees, equipment and materials that might be imposed on the cover, that covers be installed so as to prevent accidental displacement, and that covers be color-coded or marked with the word "Hole" or "Cover" to provide warning of the hazard. 29 CFR 1926.502(i), as adopted by Mich Admin Code R 408.44502. [*Post* at 4.]

Because a question of fact remains concerning Skyline's breach of a duty, summary disposition on the basis of Skyline's alternative argument is not appropriate.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens